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Supreme Court, U.S.
FILED

No.

98 452 JUL 9 1998

OFFICE OF THE CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1997

IN RE KEVAN H. GILMAN ON DISCIPLINE

Petitioner

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

KEVAN H. GILMAN
P.O. Box 8005
Van Nuys, CA 91409

1-818-902-0555

Petitioner Attorney *Pro Se*

77 pp

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S069216 SUPREME COURT

FILED

JUNE 10, 1997

Robert Wandruff, Clerk

Miner

SBC No. 92-0-13956,96-0-07119

IN THE SUPREME COURT OF CALIFORNIA

IN RE: KEVAN H. GILMAN ON DISCIPLINE

Petition for writ of review and request for recusal are denied.

It is ordered that **Kevan Harry Gilman** be suspended filed the practice of law for one year, that execution of suspension be stayed, and that he be placed on probation for two years subject to the conditions of probation, including 60 days actual suspension and payment of court imposed sanctions, as recommended by the Hearing Department of the State Bar Court in its Decision filed December 19, 1997. It is

further ordered that he take and pass the Multistate Professional Responsibility Examination within one year after the effective date of this order, (See Segretti v. StateBar (1976)15 Cal.3d. 878, 891, fn.8.). Costs are awarded to the State Bar pursuant to Business and Professions Code section 6096.1 0 and are payable in accordance with Business and Professions Code section 6140.7, as amended effective January 1, 1997.

GEORGE

Chief Justice

PUBLIC MATTER

FILED

DEC 19 97

STATE BAR COURT
CLERK'S OFFICE
LOS ANGELES

STATE BAR COURT

STATE BAR OF CALIFORNIA

HEARING DEPARTMENT - LOS ANGELES

In the Matter of

Case No. 92-O-l39S6-MSW
96-0-07119-MSW

KEVAN HARRY GILMAN,

No. 97573

DECISION

A Member of the State Bar.

INTRODUCTION

The respondent, Kevan Harry Gilman ("Respondent") defaulted in this consolidated original proceeding and the matter was submitted for decision after the office of the Chief Trial Counsel ("OCTC"), represented in this matter by

Deputy Trial Counsel Suzanne J. Anderson, waived hearing.

For the reasons stated below, the Court finds Respondent culpable of misconduct and recommends that discipline, entailing a stayed suspension and period of probation on terms including actual suspension for 60 days, be imposed as further recommended below.

PROCEDURAL BACKGROUND

Case No. 92-0-13956-NSW

OCTC initiated proceedings in this matter on January 19, 1996 by filing a Notice of Disciplinary Charges ("NODC") against Respondent. OCTC duly served Respondent with the NODC on January 22, 1996 by certified mail, return receipt requested, directed to Respondent at his official address as maintained pursuant to Business and Professions Code section[1] 6002.1 ("official address").[2]

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[1] Unless otherwise indicated, further references to "sections" are to the provisions of the Business and Professions Code.

[2] Effective August 6, 1992, Respondent's official address became 20929-47 Ventura Blvd., #142, Woodland Hills CA 91364. That

Respondent appeared at the initial status conference on March 18, 1996, but never filed an answer to that NODC, despite the Court's repeated urging that he do so. OCTC filed a First Amended NODC on March 27, 1996, and served Respondent with that pleading by certified mail, return receipt requested, sent to his official address on that same date. At the next status conference on May 9, 1996, Respondent was again reminded that he needed to file a response to the current NODC and the case was set for a further status conference on July 3, 1996.

Respondent appeared on July 3, 1996 and was again reminded that he needed to file a response to the First Amended NODC. Another status conference was set for August 29, 1996.

At the August 29, 1996 status conference, which was

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remained his official address until March 5, 1996, when he changed it to the Statewide Radiology Center, 22057 Sherman Way, Canoga Park CA 91303, which remained his official address until January 15, 1997, when it became P.O. Box 8005, Van Nuys CA 91409. The Van Nuys address remained Respondent's official address through the date this matter was submitted.

attended by both parties, the Court set various dates, including a status conference on October 29, 1996, admonished Respondent of the importance of filing a response to the First Amended NODC and indicated that the case would be referred for a Voluntary Settlement Conference ("VSC") desired by the parties as soon as Respondent filed his responsive pleading. On October 29, 1996, both parties appeared for the scheduled status conference. They again requested a VSC and the Court indicated that the case would be referred for assignment to a VSC judge as soon as Respondent filed his response to the First Amended NODC. The Court also set another status conference to occur on January 8, 1997.

Respondent never filed a response to the First Amended NODC. On November 27, 1996, OCTC filed a five-count Second Amended NODC ("96-NODC") and served Respondent with the 96-NODC by certified mail, return receipt requested, sent to his official address. The certified mail return receipt for that mailing reflects that the

1696-NODC was delivered to Respondent's official address. Respondent appeared at the January 8, 1997 telephonic status conference. At that conference, Respondent was ordered to file his response to the 96-NODC forthwith and the next status conference was set for July 31, 1997. Respondent did not indicate that he was unwilling or unable to file a response to the 96-HODC, nor was any such inability apparent to the Court.

Respondent did not thereafter file an answer to the 96-NODC and OCTC filed a motion for the entry of a default ("Default Motion") on May 12, 1997 after serving Respondent with the Default Motion on that same day by certified mail, return receipt requested, sent to his official address in Van Nuys.

Because no answer to the 96-NODC was filed by Respondent within the time required by rule 103, Rules of Procedure of the State Bar, Title II, State Bar Court Proceedings ("Rules of Procedure"), and pursuant to the Default Motion, Respondent's default was entered. On May

28, 1997, a Deputy Court Clerk of the State Bar Court served Respondent, by certified mail sent in compliance with rule 200, Rules of Procedure, with a Notice of Entry of Default. The Notice of Entry of Default sent to Respondent at his official address was not returned as undeliverable and the certified mail receipt for that mailing reflects that the notice was delivered to Respondent. On June 3, 1997, Respondent telephoned the Deputy Trial Counsel and was informed that a default had entered against him in this matter on May 28, 1997.

On July 14, 1997, Respondent filed a notion seeking, inter alia, relief from the, default that had entered against him. This motion, which was opposed by OCTC, was denied by order filed August 12, 1997.

At a July 31, 1997 status conference attended by both Respondent and OCTC, this case was ordered consolidated with case no. 96-0-07119-MSW on the court's motion after both parties indicated that there was no objection to

consolidation.[3] The subsequent procedural background of this matter is related below with the history for case no. 96-0-07119-MSW.

Case No. 96-0-07119-MSW

OCTC initiated proceedings in this matter on March 31, 1997 by filing a four-count Notice of Disciplinary Charges ("1997-NODC") against Respondent. OCTC duly served Respondent with the NODC on April 9, 1996 by certified mail, return receipt requested, directed to Respondent at his official address.

Respondent did not file an answer to the 97-NODC and OCTC filed a motion for the entry of a default ("Default Motion") on June 2, 1997 after serving Respondent with the Default Motion on that same day by certified mail, return receipt requested, sent to his official address in Van Nuys.

Respondent failed to appear at the initial status conference

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3 Although Respondent was in default, he was allowed to address the Court on this occasion as a courtesy.

on June 3, 1997. Notice of this conference had been served on him at his official address on April 18, 1997 and had not been returned as undeliverable. At this conference, the Court, inter alia, set another status conference for July 31, 1997. On June 3, 1997, an order memorializing the results of the June 3, 1997 status conference was served on Respondent by mail sent to his official address, which was not returned as undeliverable.

Because no answer to the 97-NODC was filed by Respondent within the time required by rule 103, Rules of Procedure, and pursuant to the Default Motion, Respondent's default was entered.

On June 19, 1997, a Deputy Court Clerk of the State Bar Court served Respondent, by certified mail sent in compliance with rule 200, Rules of Procedure, with a Notice of Entry of Default. The Notice of Entry of Default sent to Respondent at his official address was not returned as undeliverable and the certified mail receipt for that mailing reflects that the notice was delivered to Respondent. Respondent was

enrolled on involuntary inactive status pursuant to section 6007(e) effective June 22, 1997 due to the entry of his default in case no. 96-0-07119-MSW.

On June 22, 1997, respondent telephoned the Deputy Trial Counsel and was informed of the entry of the default in this case.

The July 31, 1997 status conference that had been calendared prior to the entry of Respondent's default in this case was held as scheduled. As noted above, case nos. 92-0-13956-MW and 96-0-07119 -MSW were consolidated at that status conferecnce.

On August 1, 1997, respondent filed a motion seeking, inter alia, relief from the default that had been entered against him. This motion, which was opposed by OCTC, was denied by order filed August 12, 1997.

The consolidated case originally came on for default hearing on August 18, 1997. Respondent was present at that time and both parties indicated a desire o try to seek a stipulated disposition. After spending some time with the

parties, the Court recessed the proceedings and gave the parties until noon of that day to reach an agreement. At 11:30 a.m., the parties returned and indicated they had arrived at a tentative agreement. At that time, respondent indicated that he wanted to talk to some friends to see whether he should accept this agreement. The parties informed the Court that it was anticipated that respondent would sign the stipulation that morning. The Court vacated the default hearing, subject to it being reset if the matter was not resolved as planned. During the afternoon hours of August 19, 1997, the Court's Deputy Case Coordinator was informed that respondent did not accept OCTC's proposed stipulation and that the default hearing should therefore go forward. Accordingly, a default hearing was held on August 20, 1997. At the audio-recorded default hearing, OCTC called no witnesses and OCTC's 15 exhibits were admitted generally. The factual allegations of the 96-NODC and the 97-NODC were also deemed admitted by operation of rule 200 (d) (1) (A), Rules of Procedure.

On August 20, 1997, Respondent filed a motion seeking to enforce a purported settlement, which was opposed by OCTC and denied by order filed September 9, 1997. With the filing of the September 9, 1997 ruling, this case was deemed submitted for decision.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Jurisdiction

Respondent has been a member of the State Bar of California ("State Bar") since his May 29, 1981 admission to the practice of law in the State of California.

Case No. 92-0-13956-HOW (96-NODC)

Findings of Fact - Counts One through Five (Maier matter)

All five counts of the 96-NODC pertain to Respondent's representation of Mr. Frank Maier ("Maier"). Accordingly, the factual findings for those counts will be stated together, with the legal conclusions addressed separately immediately following.

In August 1985, Maier employed Respondent to represent him in a wrongful termination action against Maier's former

employer. A retainer agreement was signed at that time and, in 1986, Respondent filed a case on Maier's behalf in the Superior Count for Los Angeles County. Respondent propounded discovery in March 1986.

Although the defendants did not answer the discovery for over a year, Respondent took no action to enforce discovery and personally took no further action to litigate the case after filing a First Amended Complaint October 1986.[4]

In or about October 1986, Respondent stopped working on Maier's case due to health problems, but did not inform Maier that he had ceased to prosecute his case. In May 1987, Respondent effectively transferred Maier's case to attorney John Tate without the approval or consent of Maier. A Substitution of Attorney form was not submitted to Maier for his consent and signature. Tate informed Maier in or about May 1987 that Tate's law office had been associated into the

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[4] The case docket demonstrates that Mr. Maier's declaration is incorrect in its suggestion that Respondent took no further action after March 1986 to prosecute his case other than to propound discovery that he did not thereafter enforce.

case. At that time, Tate also told Maier that Respondent was continuing to represent him; Respondent never informed Maier otherwise and Maier justifiably believed that both Tate and Respondent were working on his case. Tate also informed opposing counsel of his association.

Maier attempted to contact Respondent after learning of Tate's association, but was unable to do so. He found in trying to contact Respondent that Respondent had moved without leaving a forwarding address. Maier did not hear from Respondent after Tate was associated into the case.

On May 18, 1987, Tate filed a Notice of Association of Counsel in Maier's case.

On August 20, 1987, Mr. Tate's office wrote to Respondent and requested interrogatories that were in Respondent's possession so that responses could be prepared on behalf of Maier. Respondent had previously promised Tate's office that he would send the interrogatories to Tate, but had failed to do so. At the time Tate's office wrote to Respondent about the interrogatories, they had been granted

a brief extension of the date by which they were to answer them. It is not determinable on this record whether Respondent thereafter forwarded the interrogatories, but the letter placed Respondent on notice that he was still considered to be in the case. Attorney Tate, and Respondent, thereafter failed to prosecute Maier's case and the case was not brought to trial prior to the expiration of the 5-year statute.[5] The case was dismissed by the Superior Court with prejudice in April 1991 for that reason.

Conclusions of Law - Counts One and Two (former rule 2-111(A)(2) and rule 3-700(A)(2). Rules of Prof. Conduct)[6]

Count one alleged Respondent's violation of former rule 2-111(A)(2), which provided, in pertinent part, that an

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[5] Although Tate made efforts to bring the matter to trial, including seeking a special setting, his requests were denied.

[6] Unless otherwise indicated, further references to "former rule(s)" are to the Rules of Professional Conduct which were in effect, as here pertinent, between January 1, 1975 and May 26, 1989 and further references to "rule(s)" are to the Rules of Professional Conduct as in ef f ect after May 26, 1989. Although the rules were amended in various respects and at various times after their effective date, none of those amendments were relevant to the allegations before the Court in this consolidated matter.

attorney:

> shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.

Respondent is also accused in count two of violating rule 3-700(A)(2), which provides, in pertinent part, that an attorney; shall not withdraw from employment until the member has taken reasonable steps to avoid reasonable foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D), and complying with applicable laws and rules.

Respondent willfully violated rule 2-111(A)(2) by his de factor withdrawal from the case in or before May 1987

without giving appropriate notice of that fact to Maier, and to Tate for that matter. Although Respondent's continuing failure to notify Maier that he had withdrawn from the case also violated rule 3-700(A)(2), this finding did not greatly increase recommended discipline since the gravamen of Respondent's misconduct in regard to his improper withdrawal occurred well prior to the effective date of the current rules.

Conclusions of Law-Count Three (section 6068(m))

In count three of the 96-NODC, Respondent is charged with violating section 6068(m). Section 6068(m) directs attorneys "[t]o respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services.

Respondent violated section 6068(m) by withdrawing without informing Maier of that fact at a time when Maier reasonably believed that Respondent was still his attorney. This violation did not significantly increase recommended

discipline since the information Respondent should have conveyed to the client was that he was withdrawing from employment, and that failure is addressed in connection with the finding that Respondent violated rule 3-700(A)(2)."[7] (Cf. In the Matter of Aquiluz (Review Dept.1992) 2 Cal. State Bar Ct. Rptr. 32, 43.)

Conclusions of Law - Counts Four and Five rule 3-110(A) and former rule 6-101(A)(2))

In count four, Respondent is charged with violating rule 3-110 (A). Rule 3-110(A) provides that "[a] member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence." Former rule 6-101(A)(2), in effect until May 26, 1989, prohibited an attorney from intentionally, or with reckless disregard, or repeatedly, failing to perform legal services competently.

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7 Respondent's having moved without informing Maier of his forwarding address was not alleged as a basis for finding misconduct and also will not be considered in aggravation since this matter proceeded by default.

Although Maier's declaration suggested that Respondent failed to competently represent him prior to turning the case over to Tate, a sufficient factual basis for finding a violation of former rule 6-101(A)(2) based upon repeated, reckless or intentional incompetency was not established to have occurred during the time period encompassed by the former rules. However, Respondent willfully violated rule 3-110(A) by recklessly failing to bring Maier's case to trial in a timely fashion, which misconduct was reasonably alleged by the 96-NODC and occurred after the current rules took effect. Bringing the case to trial prior to the expiration of the five-year statute was a responsibility Respondent ultimately at least shared with Tate, and he could not have delegated his his part of that joint responsibility to Tate without Maier's knowledge. Given the need for prompt action to timely set the case for trial, it is appropriate on these facts tc find that Respondent both failed to properly withdraw from employment and violated rule 3-110(A). (Cf. In the Matter of Bach (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631,

642-643, Baker v. State Bar (1989) 49 Cal.3d 804, 816, fn. 5; compare, Guzzetta v. State Bar (1987) 43 Cal.3d 962, 979.)

Case no. 96-0-07119-MSW (97-NODC)

Findings of Fact - Counts One through Three (Azafrani matter)

Counts one through three of the 97-NODC pertain to sanctions imposed against Respondent in a civil matter entitled Solomon v. Azafrani (Los Angeles County Municipal court case no. 94V00243 in which Respondent represented the plaintiff. Accordingly, the factual findings for those counts will be stated together, with the legal conclusions addressed separately immediately following.

On November 30, 1995, the Municipal Court issued a Notice and Order to Show Cause ("OSC") why sanctions or a dismissal should not be imposed due to Respondent's failure bring the matter to trial or to effect a final disposition.[8] On

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8 It was not established on this record whether this OSC had any relationship to sanctions which were later imposed. All indications are that it did not.

March 4, 1996, the defendant's attorney, David C. Voss, requested sanctions against Respondent. On March 25, 1996, the court granted that motion and imposed $2,300 in sanctions against Respondent. The sanctions were ordered paid by April 24, 1996. Respondent failed to pay the sanctions. There is no indication in this record that any steps were taken to notify Respondent of the March 1996 sanctions order when it issued, nor was Respondent's contemporaneous knowledge of that order plead by the 97-NODC.

On October 21, 1996, the Municipal Court found Respondent in contempt of court and imposed additional sanctions in the amount of $1,650 against Respondent and in favor of opposing counsel for reasonable expenses and attorney's fees incurred due to numerous bad faith tactics by Respondent in willfully failing to obey the court's March 25, 1996 order imposing sanctions.[9] Notice of the October 21,

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[9] Based on the relevant exhibits, it appears that the pleading for this matter is incorrect in some respects. There were only two impositions of sanctions; the September 1996 sanctions pled by the 97-NODC were actually the additional sanctions imposed when Respondent was found in contempt in October 1996. Although the pleading was in error on this point, the

1996 order was sent to Respondent at 22057 Sherman Way, Canoga Park, California 91303 on October 22, 1996.[10] Respondent was ordered to pay the additional sanctions to Mr. Voss by November 20, 1996, but they had not been paid as of August 15, 1997, the date of Mr. Walker's declaration.

Respondent did not report the March 25, 1996 and September 23, 1996 sanctions to the State Bar.

Conclusions of Law Count One-(section 6103)

Count one of the 97-NODC alleged Respondent's violation of section 6103 based upon his failure to obey a

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oversight did not implicate Respondent's due process rights and he is found to have received fair notice of the allegations against him.

10 At the time the October 1996 order was served on Respondent, that was also his official address and the clerk of the Municipal Court used that address to serve Respondent with a document on November 30, 1995. For these reasons, the Court finds that the October 21, 1996 order was served to an appropriate address. (Code Civ. Proc. § 1013(a); Evid. Code § 664.)

court order. [11]

An attorney's "wil[l]ful disobedience or violation" of an "order of the court requiring" an attorney to do an act" connected with or in the course of his [or her] profession", and which he or she ought in "good faith" obey, constitutes a violation of section 6103 (section 6103; Read v. State Bar (1991) 53 Cal.3d 394, 406). An attorney faced with a sanctions order has two options: comply with the order or challenge it, which could include seeking relief from it. (In the Matter of Boyne (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 389.) Respondent did neither. Accordingly, Respondent is found to have willfully violated section 6103 based upon his failure to abide by the orders imposing sanctions. Although it was not proved that Respondent was given actual or constructive notice of the March 1996 order prior to when he was found in contempt for failing to abide by

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[11] Although the 97-NODC used "order" in the singular form, the charging language for count one made it reasonably clear that Respondent was alleged to have disobeyed more than one order.

it, the October 1996 order expressly mentioned the March 1996 order and Respondent's failure to thereafter abide by the March 1996 order constituted a violation of section 6103.

Conclusions of Law - Count Two (section 6068(b))

Section 6068(b) provides that State Bar members are to "maintain the respect due to the courts of justice and judicial officers." Count two was understood to allege Respondent's violation of section 6068(b) based upon his failure to comply with the March 1996 and October 1996 orders imposing sanctions. Although Respondent's failure to either abide by the orders or seek relief from them involved a failure to give due respect to the court which issued those orders, this count is based on the same operative facts as count one. It is therefore redundant and sustaining this allegation did not increase recommended discipline, especially since it was not shown that Respondent's failure to abide by the orders was venal or intentional. (Compare, In re Morse (1995) 11 Cal.4th 184.)

Conclusions of Law - Count Three (section 6068(o)(3))

Respondent's failure to timely report the second sanction

was a willful violation of section 6068 (0) (3).[12] 12 The basis for the first sanction was not established and it was thus not satisfactorily proved that the sanction imposed in March 1996 was one that Respondent was required to report to the State Bar. However, the October 1996 order was based upon Respondent's failure to pay the sanctions order in March 1996. As such, it was satisfactorily shown that the October 1996 sanction was not imposed for failure to make discovery and thus should have been timely reported to the State Bar. Since the pertinent language of this count alleged without limitation that Respondent had failed to report the sanctions, it was deemed admitted that Respondent had not reported either sanction to the State Bar at least as of March 31, 1997, the date that the 97-NODC was executed.

The Court accordingly finds that Respondent willfully violated section 5056(o)(3) by failing to timely report the

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Section 6068(o)(3) provides that attorneys are to report to the State Bar the imposition of ". . . any judicial sanction against the attorney, except for sanctions for failure to make discovery or monetary sanctions of less than ($1,000] . . ." within thirty days of their learning of the sanction's imposition.

October 1996 sanction to the State Bar.

Findings of Fact and Conclusions of Law-Count Four-(State Bar investigation; section 6068(i)

On December 13, 1996, an Investigator for the State Bar wrote to Respondent at what was then his official address regarding the sanctions imposed in Solomon v. Azafrani. The letter described a complaint that had been made about Respondent concerning that matter and asked for his written response by December 27, 1996. The letter was not returned as undeliverable. After he did not hear from Respondent, the investigator sent a second letter to Respondent on January 3, 1997. The second letter was also sent to Respondent's official address and not returned as undeliverable. The second letter noted that Respondent's answer to the December 1996 letter, a copy of which was included with the second letter, had not been received and asked to Respondent to provide a written response by January 17, 1997. Both letters reminded Respondent of his obligations pursuant to section 6068(i). As of the August

18, 1997 date of the investigator's declaration, Respondent had not responded to either letter and had not otherwise participated in the investigation of that complaint.

Section 6068(i) provides that a member has a duty, subject to asserted privileges, to participate and cooperate in disciplinary investigations. Respondent violated section 6068(i) by failing to participate in the State Bar's investigation of the matter.

APPROPRIATE DISCIPLINE

Factors in Aggravation of Discipline

Respondent's misconduct involved multiple acts of wrongdoing occurring over a significant time period, which is an aggravating factor under standard 1. 2 (b) (ii) , Standards for Attorney Sanctions for Professional Misconduct ("standard[s]") , Title IV, Rules of Procedure. However, a pattern of misconduct was not shown.

Respondent's misconduct caused significant harm to Maier (standard 1.2(b)(iv)) because the client's case was dismissed without being determined on its merits. In his

continued failure to satisfy the sanctions orders, to appropriately acknowledge any wrongdoing concerning his mishandling of his affairs or to otherwise seek to mitigate the damage he caused to his clients and others, Respondent has demonstrated "indifference toward rectification of or atonement for the consequences of his misconduct", an aggravating circumstance under standard 1. 2 (b) (v). (Chang v. State Bar (1989) 49 Cal.3d 114.) However, Respondent's continuing failure to pay the sanctions was given only nominal aggravating weight since it was not shown that he had or has the ability to do so.

Respondent's failure to appropriately participate in the State Bar Court proceedings prior to the defaults being entered against him was considered and given moderate weight in aggravation since he had actual knowledge of these proceedings before his defaults were entered. (Bledsoe v. State Bar (1991) 52 Cal.3d 1074, 1080; Conroy v. State Bar (1991) 53 Cal. 3d 495, 507-508; section 6068 (i) standard 1. 2 (b) (vi).

No other aggravating factors are found.

Factors in Mitigation of Discipline

Respondent has not been disciplined for professional misconduct since his 1981 admission to the State Bar and his misconduct did not commence until 1987, which is a mitigating factor pursuant to standard 1.2(e)(i). (In the Matter of Stamper (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 96, 106 [fn. 13].) This circumstance was accorded only very limited weight in mitigation. (Kelly v. State Bar (1988) 45 Cal.3d 649.)

No other mitigating factors identified as such by subdivisions (i) through (ix) of standard 1.2(e) were established. However, the Court did give limited consideration in determining the recommended discipline that Respondent's attempt to substitute Tate into Maier's case was evidently precipitated by Respondent's poor health, which most likely also made it more difficult for Respondent to subsequently give the matter the appropriate degree of attention (standard 1. 2 (e) [defining mitigating circumstance))

Applicable Dispositional Standards

The standards applicable to this case authorize a broad range of dispositions and reflect that significant discipline is in order.

Standard 2.6, contained in part B of the Standards, provides:

[c]ulpabilty of a member of a violation of any of the following provisions of the Business and Professions Code shall result in disbarment or suspension depending on the gravity of the offense or the harm, if any, to the victim, with due regard to the purposes of imposing discipline set forth in standard 1.3:

(a) Sections 6067 and 6068;

(b) Sections 6103 through 6105;

(c) Section 6106.1;

(d) Sections 6125 and 6126;

(e) Sections 6128 through 6130; or

(f) Sections 6151 through 6153.

Respondent's violations of sections 6068(b), 6068(i), 6068(o)

and 6103 are thus considered by standard 2.6.[13]

Violations of rule 3-700 are considered by standard 2.10, which provides for reproval or suspension according to the gravity of the offense or the harm, if any, to the victim, with due regard to the purposes of imposing discipline set forth in standard 1.3."

Rule 3-110(A) and section 6068(m) violations are within the ambit of standard 2.4 (b) , which provides for reproval or suspension for willfully failing to perform legal services or to communicate with clients when, as here, a pattern of such misconduct has not been demonstrated, depending upon the extent of the misconduct and the degree of harm to the client. (Levin v. State Bar (1989) 47 Cal.3d 1140, 1149-1150 [pattern of misconduct].)

Discussion

The purpose of State Bar disciplinary proceedings is

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[13] However, the section 6068(b) violation was, as noted above, redundant and thus did not affect recommended discipline.

not to punish the accused attorney, but to protect the public, to preserve public confidence in the profession and to maintain the highest possible professional standards for attorneys (Chadwick v. State Bar (1989) 49 Cal.3d 103, 111; Cooper v. State Bar (1987) 43 Cal.3d. 1016, 1025; standard 1.3). In determining the appropriate sanction to impose in each case, the mitigating and aggravating circumstances are considered and balanced, along with the specific discipline recommended by the standards for the particular misconduct found, with due regard for the purposes of imposing sanctions (standard 1.6(b)). Although of persuasive value to the Court in its deliberations, the standards are recognized as guidelines from which the Court may deviate in fashioning the most appropriate discipline considering all the proven facts and circumstances of a given matter (In re Young (1989) 49 Cal.3d 257, 267, fn. 11; Howard v. State Bar (1990) 51 Cal.3d 215).

Violations of the Business and Professions Code or Rules of Professional Conduct did not increase recommended

discipline to the extent they were redundant to other found violations (cf. Bates v. State Bar (1990) 51 Cal.3d 1056, 1059-1060).

The Office of Trials seeks a disposition of a one-year stayed suspension and probation for two years on conditions including actual suspension for at least 90 days. The Court agrees with those recommendations, except as concerns the actual suspension. Although Respondent's misconduct caused serious repercussions for Mr. Maier, this is also his first disciplinary matter since being admitted to the State Bar in 1981, and it involved a single client-related matter and misconduct which was apparently aggravated if not caused in in part by Respondent's ill health. Even though Respondent's misconduct viewed in its totality was substantial, an actual suspension of 90 days is not indicated at this juncture. On the other hand, the moderately serious nature of Respondent's misconduct and the other aggravating circumstances present clearly demonstrate that a sanction much greater than a reproval or completely stayed suspension is in order.

(Compare In the Matter of Respondent G (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 175 [recon. den. September 22, 1992; mitigated failure to complete performance of promised legal services results in private reproval].) Keeping in mind the goals of disciplinary proceedings, it appears that a moderate actual suspension of Respondent's license to practice law, followed by remedial education and continuing probationary controls, is appropriate. Respondent's misconduct was, as noted above, substantial and the Court is unaware of any factors clearly tending to indicate that it was aberrant or highly mitigated.

The Court is particularly concerned with Respondent's failure to appropriately participate in these proceedings prior to the entry of the defaults. By his lack of appropriate participation, the Court has been deprived of any meaningful information which might have addressed the cause of Respondent's misconduct. Respondent's participation might also have reassured this Court that he regretted his wrongful conduct and had taken steps to prevent its reoccurrence.

However, when his nonparticipation is considered in conjunction with his misconduct, it appears that Respondent is, for whatever reason, currently unable to conform his conduct to professional standards and thus could pose some risk to the public with regard to future misconduct were he not subject to probationary monitoring for a time.

The disposition recommended here is also within the applicable standards and consistent with the discipline imposed in prior matters. For example, serious harm to a single client resulted in a ninety-day actual suspension in Harris v. State Bar (1990) 51 Cal.3d 1082. However, the attorney in Harris also repeatedly misrepresented the case's status to his client. Even considering the misconduct found in connection with the 97-NODC and the fact that Harris participated in his disciplinary case and established mitigation not found here, Harris was a substantially more serious case. Also by way of comparison, the misconduct found in Van Sloten v. State Bar, (1989) 48 Cal.3d 921, a case in which no actual suspension was imposed, was

considerably less serious than that found there; no serious harm came to the client in Van Sloten. (Compare also In the Matter of Aguiluz (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 32 [abandonment of single client causing no proven serious harm to client results in recommended one-year stayed suspension and two-year probation term] and In the Matter of Layton (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 366.) Under all the proven circumstances, it appears that a 60-day actual suspension would be most appropriate and that will be the recommendation. (See also Wren v. State Bar (1983) 34 Cal.3d 81.)

OCTC's pre-trial brief did not request a recommendation that Respondent be ordered to make restitution. However, at the default hearing, OCTC requested that Respondent be required to pay the sanctions imposed in Solomon v. Azafrani and to make restitution to Maier in the principle amount of $2,500. It appears appropriate to recommend that Respondent be required to comply with the two orders imposing sanctions that were issued in Solomon v. AzAfrani as a condition of his

probation. Doing so will impress upon him that attorneys are expected to abide by final court orders and thus aid in his rehabilitation."[14] 14 (Cf. Sorensen v. State Bar (1991) 52 Cal.3d 1036 [purpose of restitution].) Interest will be recommended to accrue from November 20, 1996, the date by which Respondent was ordered to pay the October 1996 sanctions, since Respondent had been given at least constructive notice of both orders by that date. However, on this record it does not appear appropriate to recommend restitution to Mr. Maier. Maier's damages due to this dismissal of his case were not shown to have been liquidated and this Court is not permitted to speculate as to the amount of those damages (In the Matter of Bach (Review Dept. 1991) 51 Cal. State Bar Ct. Rptr. 631, 650). Although Mr. Maier apparently advanced some fees to Respondent, Respondent also evidently did some work on the case. More importantly,

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14 Assuming that the Supreme Court directs Respondent to pay restitution as recommended, if Respondent is subsequently able to obtain relief from either or both of the orders imposing sanctions, he may wish to move to modify his probation.

Respondent was not charged with a failure to refund unearned fees or with charging an unconscionable fee, so the questions of what funds were advanced and what part, if any, of those funds were unearned, were not before the Court in these proceedings.

OCTC also sought a mental health condition of probation. Based upon the assertions made by Respondent in his declarations in support of his motions for relief from default, such a condition would seem appropriate as a means of assisting Respondent, and thus also his future clients, in continuing the commendable steps he has already taken toward addressing these issues during this difficult time in his life. The Court has structured its recommendation so that this condition can be terminated as soon as Respondent establishes that it is no longer necessary.

Respondent is strongly cautioned that his willful failure to comply with any probation conditions imposed in this matter may lead to more severe discipline (cf. section 6068 (k) ; standard 1. 7).

Recommended Discipline

Based on the foregoing, it is hereby recommended that Respondent, Kevan Harry Gilman, be suspended from the practice of law in the State of California for one year, that execution of that order of suspension be stayed, and that Respondent be placed on probation for two (2) years upon the following conditions:

1. That Respondent shall be actually suspended during the first 60 days of his probation.

2. That, within one year of the of fective date of the order imposing discipline in this matter, Respondent shall pay the sanctions imposed against him by the Municipal Court in Orange County by orders filed on March 25, 1996 and October 21, 1996 in (case no. 94VO0243), plus interest at the rate of 10 % per annum from November 20, 1996, and shall provide the State Bar Probation Unit with satisfactory written proof that he has done so.

3. That, during the period of probation, Respondent shall comply with the provisions of the State Bar Act (see, section

6000) and Rules of Professional Conduct of the State Bar of California.

4. That, during the period of probation, Respondent shall report in writing not later than January 10, April 10, July 10 and October 10 of each year, or part thereof, during which the probation is in effect, to the State Bar Probation Unit, Office of Trials, Los Angeles, which report shall state that it covers the preceding calendar quarter or applicable portion thereof, certifying by affidavit or under penalty of perjury (provided, however, that if the effective date of probation is less than 30 days preceding any of said dates, Respondent shall file said report on the due date next following the due date after said effective date):

(a) in his first report, whether he has complied with all provisions of the State Bar Act and Rules of Professional Conduct since the effective date of said probation;

(b) in each subsequent report, whether he has complied with all provisions of the State Bar Act and Rules of Professional Conduct during said period;

(c) provided, however, that a final report shall, be filed no earlier than 30 days prior to the date probation is scheduled to expire and no later than said expiration date which shall cover the portion of the period of probation following the last report required by the foregoing provisions of this paragraph and shall certify to the matters set forth in subparagraph (b) thereof.

5. That, subject to assertion of applicable privileges, Respondent shall answer fully, promptly and truthfully any inquiries of the State Bar Probation Unit which are directed to Respondent personally or in writing relating to whether Respondent is complying or has complied with these terms of probation.

6. That, within one year of the effective date of the Supreme Court's order imposing discipline in this matter, Respondent shall attend and successfully complete the Ethics School seminar offered by the State Bar of California.

7. That, within 30 days of the effective date of the Supreme Court's order imposing discipline in this matter,

Respondent shall commence or continue receiving psychiatric or psychological care at his own expense from a duly licensed psychiatrist, clinical psychologist or clinical social worker and shall continue with such care at least once each month during the period of probation, and shall furnish evidence to the Probation Unit, Office of Trials, Los Angeles that he is so complying with each report that he is required to render under these conditions of probation; provided, however, that should it be determined by said psychiatrist, psychologist or clinical social worker that Respondent has recovered from any significant mental infirmities, Respondent may file a motion for modification of this condition with the State Bar Court, which shall have attached a declaration from Respondent's psychiatrist, psychologist or clinical social worker that no further care pursuant to this condition is necessary.

8. That Respondent shall promptly, and in any event within ten (10) days, report to the membership records office of the State Bar and to the Probation Unit, office of Trials, Los Angeles, all changes of information, including current office or

other address for State Bar purposes, as prescribed by section 6002.1 of the Business and Professions Code.

9. That the period of probation shall commence as of the date on which the order of the Supreme Court imposing discipline in this matter becomes effective.

10. That, at the expiration of the period of this probation, if Respondent has complied with the terms of probation, the order of the Supreme Court suspending Respondent from the practice of law for a period of stayed suspension specified above shall be deemed satisfied and that suspension shall be terminated.

It is further recommended that Respondent be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners within one year after the effective date of this order and provide the State Bar Probation Unit with satisfactory evidence of his passage of that examination within said year. (see Segretti v. State Bar (1976) 15 Cal. 3d. 878, 891, fn. 8)

Costs

It is further recommended that costs be awarded to the State Bar pursuant to section 6086.10 and that such costs be ordered paid in accordance with section 6140.7.[15]

Dated: December 19, 1997

Madge S. Watai

Judge of the State Bar Court

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15 If an actual suspension is imposed, Respondent will remain suspended until those costs are paid unless he successfully petitions for relief from costs (see, rule 282, Rules of Procedure)

STATE BAR OF CALIFORNIA
Office of the Clerk
State Bar Court
1149 South Hill, 5th Floor
Los Angeles, California 90015
(213) 765-1400

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN THE MATTER OF

Transmittal of State Bar Court Recommendation

KEVAN HARRY GILMAN S

State Bar Court No. 92-0-13956 ET AL

A Member of the State Bar

Conviction proceeding (Rule 95 1 (a), Cal. Rules of Ct.)

Rule 955 proceeding (Rule 955, Cal. Rules of Ct.)

[XI Original proceeding (Bus. and Prof. Code § 6081)

[I] Other proceeding

To the CLERK OF THE SUPREME COURT:

1. RECOMMENDATION. The State Bar Court hereby transmits its recommendation in the above-entitled matter,

as reflected in the enclosed proposed order subject to review by the Supreme Court.

2. RECORD ENCLOSED. Enclosed please find the official State Bar Court file in the above-entitled matter including:

[XI State Bar Exhibits I- *15*

Respondent Exhibits

Transcript (s) of State Bar Court Hearings

3. IMPOSITION OF COSTS, Pursuant to Section 6086.10, Business and Professions Code, statutorily authorized costs of this disciplinary proceeding should be awarded to the State Bar of California. Enclosed are the Certificate of Costs and Statements of Costs pursuant to rule 280-284, Rules of Procedure for State Bar Court Proceeding.

4. MEMBER'S ADDRESS:

State Bar records list the following current address for the above member:

P.O. Box 8005
Van Nuys, CA 91409

5. INFORMATION GIVEN MEMBER. We have this day mailed to the member information about:

California Rules of Court
re: Authority of the State Bar Court

rule 952, California Rules of Court
re: review of State Bar Court decision

rule 953, California Rules of Court
re: effective date of Supreme Court Order

rule 954, California Rules of Court
re: grounds for review of State Bar Court decisions in Supreme Court

rule 955, California Rules of Court
re: duties of disbarred, resigned or suspended members

Business & Professions Code Section 6083 re: petition to review State Bar Court decision

Business & Professions Code Section 6086.10 and 6140.7 re: costs of disciplinary proceeding

6. [XI OTHER INFORMATION TO ASSIST THE SUPREME COURT:

This attorney has not had prior discipline imposed. However, on June 22, 1997, Mr. Gilman was ordered inactive pursuant

to Business and Professions code 6007(e) in 96-0-7119.

We would like to bring to the Court's attention that Mr. Gilman currently has no matters pending with the Supreme Court.

Judy Duffield
Clerk of the State Bar Court

February 25, 1998

By:
Erick E. Estrada
Deputy Court Clerk

State Bar Court Case No. 92-0-13956; 96-0-07119 (Cons.))

IN THE SUPREME COURT OF CALIFORNIA

IN RE **KEVAN HARRY GILMAN** ON DISCIPLINE

It is ordered that **Kevan Harry Gilman** be suspended from the practice of law for one year, that execution of suspension be stayed, and that he be placed on probation for two years subject to the conditions of probation, including 60 days actual suspension and restitution, as recommended by the Hearing Department of the State Bar Court in its Decision filed December 19, 1997. It is further ordered that he take and pass the Multistate Professional Responsibility Examination within one year after the effective date of this order. (See Segretti v. State Bar (1976)15 Cal.3d. 878, 891, fn.8.). Costs are awarded to the State Bar pursuant to Business and Professions Code section 6096.1 0 and are payable in accordance with Business and Professions Code section 6140.7, as amended effective January

1, 1997.

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Chief Justice

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT, DIVISION ONE

FRANK J. MAIER, B094519

Plaintiff, Appellant and Respondent, (Super. Ct. N6. EC 007860)

v. Court of Appeal- Second Dist.

KEVAN HARRY GILMAN, Defendant, Respondent and Appellant.

JUL 3 1997
FILED
DEPUTY CLERK

APPEAL from a judgment of the Superior Court of Los Angeles County. David M. Schacter, Judge. Cross-appeal reversed; appeal dismissed.

Frank J. Maier, in pro. per., for Plaintiff, Appellant and Respondent.

Girardi & Keese, Anne M. Huarte and John A. Girardi for Defendant, Respondent and Appellant.

This appeal and cross-appeal involve a malpractice action brought by Frank J. Maier against his former attorney, Kevan Harry Gilman. Due to the termination of the attorney-client relationship prior to the alleged malpractice committed by Gilman's successor, we reverse the judgment for Maier and enter judgment for Gilman.

BACKGROUND

On August 12, 1985, Maier hired Gilman to represent him in a wrongful ion case against Maier's former employer, Sargent Industries' Airite Division. As quality manager, Maier felt he had been being pressured by his superiors to sign off on defective hardware being sold to the military. Maier believed he had been wrongfully terminated for reporting the improprieties to Airite's president, John Jarboe. In 1987, less than two years after Maier hired Gilman, Gilman temporarily quit the practice of law due to "an emotional 'burn-out[]'" that left him "unable to handle his caseload." Gilman turned over all (125-150 cases) but his wrongful termination cases to another

firm, and gave the remaining wrongful termination cases, including Maier's to an attorney, John Tate, who handled such matters. For about a year, Gilman did not practice law. It is undisputed that Maier did not know what had happened to Gilman until May 1987, when Tate informed him that Gilman was ill and had asked Tate to handle Maier's case. It is also undisputed that Tate filed an association of counsel form in May 1987. According to Maier's testimony, he believed Tate was simply associating himself as cocounsel with Gilman, and that Gilman was still representing him. Maier contends he never agreed to allow Gilman to withdraw.

The undisputed facts showed, however, that after Tate began working on Maier's case in May 1987, Gilman ceased working on it. Although Gilman resumed the practice of law about a year later, he did not contact Tate or Maier anil performed no work on Maier's behalf.

On January 24, 1991, almost four years after Tate took over Maier's case, Maier's case was dismissed for failure to

prosecute. [1] Maier appealed from the adverse order, but that appeal was dismissed.

On February 19, 1992, more than one year after the dismissal, Maier filed a legal malpractice action against Gilman.[2] Following a court trial, judgment was entered against Gilman, who was ordered to pay the wrongful termination (breach of contract) damages of $107,252 that Maier would have won had Tate not committed malpractice. Maier appealed (in pro. per.), contending he should have been awarded tort damages as well because, absent Tate's alleged malpractice, he would have recovered tort damages for wrongful termination in violation of public policy. Gilman cross appealed, contending he is not liable for Tate's malpractice since he had terminated

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1 The record indicates the dismissal order followed a discovery sanction order entered on January 3, 1991, which prohibited Maier from opposing 15 of Airite's claims.

2 Maier also sued Tate, who is not a party to this appeal. Although Maier obtained a judgement against Tate for general, special, and punitive damages of $1,033,463, Maier contends Tate is "judgment proof." We express no opinion in this appeal as to whether Tate committed malpractice.

the attorney-client relationship with Maier in May 1987.

The court below found, among other things, that because Gilman had failed to file a substitution of attorney form and Tate had filed an association of counsel form in May 1987, the record was ambiguous as to whether Gilman continued to represent Maier. The court concluded that as an attorney, Gilman should have clearly and unambiguously terminated his representation of Maier, a simple task accomplished by filing a substitution of attorney form. Due to Gilman's omission and Tate's filing of an association of counsel form, the court concluded Gilman had continued to represent Maier even though Gilman no longer worked on the case after May 1987. The court expressly absolved Gilman of personally committing any negligent acts during his active representation of Maier, but held Gilman liable for his associate counsel's subsequent negligence.

Gilman testified he first learned Tate had mistakenly filed an association of counsel form when the State Bar

contacted him in 1991 to investigate Maier's complaint regarding the dismissal of his wrongful termination lawsuit. According to Gilman, when he transferred Maier's file to Tate in May 1987, he also had given Tate a signed substitution of counsel form which Tate was to file after informing Maier of Gilman's illness and obtaining his consent to the substitution.[3] Gilman further testified that substitution of attorney forms were filed in all of the other cases Tate had received from Gilman except this one.

It is undisputed that Gilman and Maier had no further contact after Tate took over the case other than a chance encounter in a restaurant in late 1987. After May 1987,

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3 When shown Tate's letter dated May 14, 1987, informing opposing counsel in the underlying wrongful termination action that Tate had associated in as counsel, Gilman testified he could not recall receiving the letter even though it indicated at the bottom that a copy has been sent to him.

Gilman further testified that after the State Bar contacted him in 1991 regarding Maier's complaint, Gilman spoke with Tate, who claimed he had filed a substitution of attorney form in this action. Tate also sent Gilman a letter to this effect dated September 6. 199 1. The record, however, does not otherwise indicate z substitution of attorney form was filed.

Gilman's name did not appear on any proof of service forms contained in Maier's court file. The record further shows that after Gilman handed over Maier's files to Tate, Maier sent a letter to Tate dated March 29, 1990, setting forth the chronology of his wrongful termination lawsuit. Regarding Gilman's withdrawal from the case, Maier wrote that between June and November 1987, his "[c]ase [was] by John T.Tate[,] Jr.[,] Esq." (Emphasis added.) Similarly, in a letter dated January 26, 1991, Maier referred to a past event and described Gilman as his former or "then" attorney[,]" (emphasis added) suggesting that Maier no longer considered Gilman to be his attorney. Also in the January 26 letter, Maier acknowledged that Gilman no longer had possession of Maier's case files, stating , "...I hope ... Gilman forwarded same to you with the rest of the files."

Despite the above evidence of Maier's state of mind, the trial court held Gilman liable for Tate's alleged negligence based on the absence of a formal withdrawal and the presence of an

association of counsel form. The statement of decision (which made no reference to the documents which demonstrated Maier's state of mind) said in part: "This Court finds that there were no clear, concise, or unambiguous actions by Mr. Gilman that terminated the attorney/client relationship. His activity at Mr. Tate's office would only bolster the client's impression that he was still involved in the case. The technical requirements for being relieved as counsel are clear, specific, and easily found. C[ode of] C[ivil] P[rocedure] [section] 284 states that '(t)he attorney in an action or special proceeding may be changed at any time before or after judgment or final determination, as follows: 1.) Upon the consent of both client and attorney, filed with the clerk, or entered upon the minutes[;] 2.) Upon the order of the court, upon the application of either client or attorney, after notice from one to the other.' []. . - [] Though this court commiserates with the problems Mr. Gilman had at the time he handed over the file to Mr. Tate, he was still not relieved of his professional responsibilities.

Argument may be made that Mr. Maier is a sophisticated and intelligent individual that must have known that Mr. Gilman was no longer involved in the prosecution of his case. This type of argument completely belies the purpose and intent of the rules of professional conduct. [1] Mr. Gilman's conduct may be considered omission rather than commission regarding his attempt to extricate himself from this case. The fact is that he never relieved himself from his professional responsibilities to Mr. Maier. His failure to be substituted out of the case and his association with Mr. Tate left him in the position of being one with Mr. Tate. As an aside, if Mr. Tate had successfully prosecuted this case to an outstanding award, it is doubtful any of Mr. Gilman's assertions of no connection with Mr. Tate would be professed.[4]

DISCUSSION

We conclude the trial court placed undue reliance upon

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[4] This gratuitous comment was speculative as there was no evidence below of any fee properly agreement between Gilman and Tate.

the absence of a formal withdrawal and the presence of an association of counsel form. Even though Gilman failed to file a formal withdrawal, he effectively ceased representing Maier, who allowed Tate to handle the case due to the exigency created when Gilman abruptly closed his practice due to illness. While the association of counsel form injected an ambiguity on the surface of the record concerning Gilman's continued representation of Maier, the overwhelming evidence at trial established that Maier had switched attorneys and knew by mid to late 1987 that Gilman was no longer representing him. Thereafter, Maier described Gilman as his former or 'then attorney" and openly acknowledged that Tate had taken over the case. After May 1987, Maier and Gilman had no further contact, and Gilman performed no further work on the case. Based on these facts, Gilman's failure to file a substitution of attorney form could not, as a matter of law, have misled Maier to believe Gilman was still his attorney.

While Professor Chemerinsky, who appeared at trial as

a court-appointed expert under Evidence Code section 730, testified that in the hypothetical situation posed by the court with the parties' consent, the first attorney (Gilman) did not terminate the attorney-client relationship by bringing in an associate attorney (Tate), Chemerinsky also testified it is possible to terminate an attorney-client relationship without filing a formal withdrawal. One such instance, according to Chemerinsky, would be when the client consents to the attorney's withdrawal and the attorney has protected the client's interests. We agree with that aspect of Chemerinsky's testimony. In this case, Gilman was ill and incapacitated when he asked Tate to handle Maier's lawsuit and to inform Maier of Gilman's illness. Although it would have keen preferable for Gilman to obtain Maier's consent to the substitution and file a formal withdrawal, his omissions did not, under the circumstances, preserve the attorney-client relationship.

The failure to file a formal substitution of attorney form is not, in itself, dispositive of whether there was continued

representation so as to toll the statute of limitations for legal malpractice claims. (Code Civ. Proc., § 340.6.). [5] "[T]he issue of tolling because of continued representation is not just answered by whether there has been a proper, formal withdrawal. Failure to formally withdraw as counsel 'standing alone' does not constitute continued representation for purposes of tolling section 340.6. (Citations.]" *(Johnson v. Haberman & Kassoy* (1988) 201 Cal.App.3d 1468, 1474-1475.) "We do not believe that the Legislature intended the presence or absence of a formal withdrawal to be dispositive of

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5 Code of Civil Procedure section 340.6 provides: An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first. In no event shall the time for commencement of legal action exceed four years except that the period shall be tolled during the time that any of the following exist: [1] (I) The plaintiff has not sustained actual injury; [I (2) The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred; [1] (3) The attorney willfully conceals the facts constituting the wrongful act or omission when such facts are known to the attorney, except that this subdivision shall toll only the four-year limitation; and (4) The plaintiff is under a legal or physical disability which restricts the plaintiff's ability to commence legal action."

the continued representation issue." *(Shapero v. Fliegel (I* 987) 191 Cal.App.3d 842, 847, fn. omitted.)

Where, as here, the attorney becomes incapacitated and closes his office because he is incapable of practicing law, we decline to conclude, based exclusively on the presence or absence of a formal withdrawal, that the attorney continued to represent the client after another attorney took over the case. Had Gilman continued to practice law while incapacitated, he would have acted unethically and irresponsibly. By locating other counsel and effectively withdrawing from the case, Gilman avoided that undesirable result. Despite Gilman's failure to file a formal withdrawal, Maier knew Gilman was incapacitated and incapable of representing him and that Tate was taking over the case. On these facts, Gilman's omission will not toll the statute of limitations under the doctrine of continued representation. While the better practice would have been for Gilman to file a formal withdrawal, his omission was inconsequential in this case and cannot, as a matter of law,

support a finding of continued representation.

In addition, we conclude the unique facts of this case warrant a finding, as a matter of law, that Gilman effectively terminated the attorney-client relationship in May 1987 when Maier agreed to allow Tate to represent him. Accordingly, Gilman may not be held liable for any subsequent negligence committed by Tate, and is entitled to a judgment in his favor.

DISPOSITION

On Gilman's cross-appeal, we reverse the judgment for Maier and enter judgment for Gilman, who is awarded costs. We dismiss Maier's appeal as moot.

NOT TO BE PUBLISHED.

ORTEGA, J.

We concur:

SPENCER, P.J.

MASTERSON, J.

THE STATE BAR ACT

California Business and Professions Code

Sec. 6007(e)(1) INVOLUNTARY INACTIVE ENROLLMENT

"The board (of Governors of the State Bar of California) shall order the involuntary, inactive enrollment of a member whose default has been entered pursuant to the State Bar Rules of Procedure if both of the following conditions are met: (A) The notice was duly served pursuant to subdivision (c) of section 6002.1, (B) The notice contained the following language at or near the beginning of the notice, in capital letters: IF YOU FAIL TO FILE AN ANSWER TO THIS NOTICE WITHIN THE TIME ALLOWED BY STATE BAR RULES, INCLUDING EXTENSIONS, OR IF YOU FAIL TO APPEAR AT THE STATE BAR COURT TRIAL, (1) YOUR DEFAULT SHALL BE ENTERED, (2) YOU SHALL BE ENROLLED AS AN INVOLUNTARY INACTIVE MEMBER OF THE STATE BAR AND WILL NOT BE

PERMITTED TO PRACTICE LAW UNLESS THE DEFAULT IS SET ASIDE ON MOTION TIMELY MADE UNDER THE RULES OF PROCEDURE OF THE STATE BAR, (3) YOU SHALL NOT BE PERMITTED TO PARTICIPATE FURTHER IN THESE PROCEEDINGS UNLESS YOUR DEFAULT IS SET ASIDE, AND (4) YOU SHALL BE SUBJECT TO ADDITIONAL DISCIPLINE."

Sec. 6007(e)(2) INVOLUNTARY INACTIVE ENROLLMENT

"The board (of Governors of the State Bar of California) shall terminate the involuntary inactive enrollment of a member under this subdivision when the member's default is set aside on motion timely made under the State Bar's Rules of Procedure or the disciplinary proceedings are completed."

Sec. 6007(e)(1) INVOLUNTARY INACTIVE ENROLLMENT

"The enrollment under this subdivision is administrative in character and no hearing is required."

Sec. 6079.1 STATE BAR COURT HEARING JUDGES

(a) The Supreme Court shall appoint a presiding judge of the State Bar Court and no fewer than seven hearing judges, and any additional hearing judges as may be authorized by the Legislature, to efficiently decide any and all regulatory matters pending before the Hearing Department of the State Bar Court. . .

(c) The board shall screen and rate all applicants for appointment or reappointment as a State Bar Court judge, and submit its nominations to the Supreme Court, unless otherwise directed by the Supreme Court. . .

(d) For judges appointed pursuant to this section or Section 6086.65, the board shall fix and pay reasonable compensation and expenses and provide adequate supporting staff and facilities.

Sec. 6079.5 CHIEF TRIAL COUNSEL; APPOINTMENT; TERM; QUALIFICATIONS

(a) The board shall appoint a lawyer admitted to practice in

California to serve as chief trial counsel. . .

Sec. 6086.5 STATE BAR COURT; ESTABLISHMENT; POWERS; RULES

The board of governors shall establish a State Bar Court, to act in its place and stead in the determination of disciplinary and reinstatement proceedings and proceedings pursuant to subdivisions (b) and (c) of section 6007 to the extent provided by rules adopted by the board of governors pursuant to this chapter. . .

Sec. 6086.10 PAYMENT OF COSTS OF DISCIPLINARY PROCEEDINGS

(a) Any order imposing a public reproval on a member of the State Bar shall include a direction that the member shall pay costs. In any order imposing discipline, or accepting a resignation with a disciplinary matter pending, the Supreme Court shall include a direction that the member shall pay costs.

(b) The costs required to be imposed pursuant to this section

include all of the following:

(1) The actual expense incurred by the State bar for the original and copies of any reporter's transcript of the State Bar proceedings, and any fee paid for the services of the reporter.

(2) All expenses paid by the State Bar which would qualify as taxable costs recoverable in civil proceedings.

(3) The charges determined by the State Bar to be "reasonable costs" of investigation, hearing, and review. These amounts shall serve to defray the costs, other than fees for the services of attorneys or experts, of the State bar in the preparation or hearing of disciplinary proceedings, and costs incurred in the administrative processing of the disciplinary proceedings and in the administration of the client security fund. . .

(d) In the event an attorney is exonerated of all charges following a formal hearing, he or she is entitled to reimbursement from the State bar in the amount

determined by the State bar to be the reasonable expenses, other than fees for attorneys or experts , of preparation for the hearing. (Added by Stats. 1986, ch. 662.)

STATE BAR COURT
OF THE STATE BAR OF CALIFORNIA
1149 South Hill Street
Los Angeles, CA 90015-2299

(213) 765-1400

For State Bar Court
FILED
FEB 25 1998
STATE BAR
COURT
LOS ANGELES

In the Matter of

KEVAN HARRY GILMAN

Member of the State Bar

CERTIFICATE OF COSTS

CASE NO. 92-0-13956
ET. AL

Imposition of the following costs are recommended pursuant to Business and Professions Code Section 6086.10(b) (1)-(3):

1. Transcript Costs and Court Reporter Fees.....1.$ 0

2. Taxable Costs Recoverable (see attached Statement of Costs)

a. Deposition Costs.....2.a.$ 0

b. Service of Process.....2b.$ 0

c. Witness Costs.....2.c.$ 0

d. Court-ordered Transcripts.....2.d$ 0

e. Exhibit Costs.....2.e$ 0

f. Court-ordered Expert Costs.....2.f.$ 0

g. Other Reasonable Costs.....2.g.$ 0

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h. Reasonable Costs (see attached Statement(s) of Costs)

a. Office of Investigation Costs.....3.a.$ 774.00

b. Office of Trial Counsel Costs.....3.b $ 628.00

c. Office of State Bar Court Costs.....3.c.$ 1,851.00

TOTAL COSTS.....$3,253.00.

I, Judy Duffield, Clerk of the State Bar Court, do certify that to the best of my knowledge and belief the above costs, based on this certificate and the accompanying statement(s) are correct as provided by rule 461, Rules of Procedure of the State Bar of California.

Judy Duffield
Clerk of the State Bar Court

February 25,1998 BY: (SIGNED)

Eric E. Estrada, Deputy Court Clerk, III

STATEMENT OF COSTS

Office of the State Bar Court

of the State Bar of California

In the Matter of KEVAN HARRY GILMAN

Case Number (s) 92-0-13956 et. al

Pursuant to Business and Professions Code Section 6086.10, it is requested that Kevan Harry Gilman, a member of the State Bare of California, be ordered to pay the following costs.

Reasonable Costs of the Office of the State Bar Court

1. Level One Assessment $

   (Stipulated Disposition reached prior to filing of a Notice to Show Cause]

2. Level Two Assessment $

   [Stipulated disposition reached prior to time of trial]

3. Level Three Assessment $

[Stipulated disposition reached at time of trial or trial not exceeding one day is conducted]

4. Level Four Assessment $ 1,851.00

[Trial exceeding one day is conducted]

5. Resignation of Member with Charges Pending $

Judy Duffield

Clerk of the State Bare Court

February 25,1998 BY: (SIGNED)

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Eric E. Estrada, Deputy Court Clerk, III